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IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM S. HARRIS,
Petitioner,

v.

ROSALYN S. HARRIS FENN,
Respondent.

CONCEPCION QUEVEDO,
Petitioner,

v.

MARY HELEN QUEVEDO,
Respondent.

GERALD H. GOLDSTEIN,
Petitioner,

v.

DORINE S. WOLPA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Does the decision of *McCarty v. McCarty* affect a previously Court ordered division of military retired pay?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners, WILLIAM S. HARRIS, CONCEPCION QUEVEDO, and GERALD H. GOLDSTEIN, pray that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of California rendered in these proceedings on August 10, 1983.

OPINIONS BELOW

The Order of the California Supreme Court denying a hearing in this matter is found at Appendix A.

The opinion of the Court of Appeal, Fourth Appellate District, Division One, appears at Appendix B. It was not recorded.

The Order of the trial court in *Fenn v. Harris* appears in Appendix C.

The Judgment After Trial by Court in the case of *Wolpa v. Goldstein* appears in Appendix D.

The Interlocutory Judgment of Dissolution of Marriage in the case of *Quevedo v. Quevedo* appears in Appendix E.

JURISDICTION

The Order or judgment of the California Supreme Court was entered on August 10, 1983 (see Appendix A). This Petition for Writ of Certiorari was filed less than ninety days from the date of aforesaid. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Clauses 13 and 14:

> (13) NAVY. To provide and maintain a Navy.
>
> (14) GOVERNMENT AND REGULATION OF LAND AND NAVAL FORCES. To make Rules for the Government and Regulation of the land and Naval Forces.

Constitution of the United States, Article III, Section 2:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

Constitution of the United States, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."

Constitution of the United States, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

Constitution of the United States, Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF FACTS

The facts relevant to the questions presented by this Petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

The three cases were consolidated on appeal by Order of the Fourth Appellate District Court, Division One, on December 12, 1982. In the cases of *Fenn v. Harris* and *Wolpa v. Goldstein*, the military retired pay was not divided between the military person and his spouse. These

judgments were later modified in independent actions filed by the former spouses in that the military pay was divided.

In the case of *Quevedo v. Quevedo*, the military pay was divided at the time of the interlocutory judgment between the military person and his spouse.

In the case of *Fenn v. Harris*, the original interiocutory judgment was granted on September 12, 1968 and it did not divide Mr. Harris' military pay. Final judgment dissolving the marriage was entered in 1969. Then in 1977, Mrs. Fenn instituted proceedings to partition Mr. Harris' military pension as community property of the former marriage. Mr. Harris moved for summary judgment in that at the time judgment was rendered in the dissolution, military pensions were not considered to be property of the marriage. The Court granted Mr. Harris' motion for summary judgment. Mrs. Fenn appealed and the Fourth District Court of Appeal reversed the trial court's decision.

On February 27, 1980, at the time of trial, Mr. Harris was ordered to pay Mrs. Fenn 38.6% of his military retired pay and $16,757.30 in arrearages. After this Court's decision in *McCarty v. McCarty* (1981) 483 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, Mr. Harris brought an order to show cause to relieve him of his obligation to divide his military retired pay. Mr. Harris appealed from the denial of this order filed October 19, 1981. The case was consolidated with the other two cases by order of the Fourth District Court of Appeal on December 10, 1982.

On June 16, 1983, the Fourth District Court of Appeal upheld the lower Court's decision. The opinion can be found in Appendix B.

On August 10, 1983, the California Supreme Court denied a hearing on this matter.

In *Quevedo v. Quevedo*, in a 1979 Interlocutory Judgment, Mr. Quevedo stipulated to a division of his military retired pay. Mr. Quevedo, in a statement filed in connection with his later motion to set aside the stipulation, alleged that his attorney had told him he had "no choice" but to stipulate to its division in light of the then-state of the law.

On September 2, 1981, Mr. Quevedo filed a motion for relief from the obligation to pay Mrs. Quevedo 39% of his gross military retired pay. The Order After Hearing denied his motion and was filed on December

1, 1981. This case was consolidated with the other two cases by Order of the Fourth District Court of Appeal, Division One, on December 10, 1982.

On June 16, 1983, the Fourth District Court of Appeal upheld the lower court's decision. The opinion can be found in Appendix B. Then on August 10, 1983, the California Supreme Court denied a hearing on this matter.

In the case of *Wolpa v. Goldstein*, the Interlocutory Judgment was entered on August 9, 1965, and did not divide Mr. Goldstein's military retired pay. The Final Judgment was entered on August 10, 1966. In 1978, his former wife filed a complaint for declaratory relief to partition the retired military pay. After trial on June 12, 1980, the Court awarded the former spouse 36.27% of Mr. Goldstein's retired military pay.

On August 6, 1981, Mr. Goldstein filed a motion to vacate judgment and declare judgment void. That motion was denied on December 1, 1981. This case was consolidated with the other two cases by Order of the Fourth District Court of Appeal, Division One, on December 10, 1982.

Then on June 16, 1983, the Fourth District Court of Appeal upheld the lower court's decision. That opinion can be found in Appendix B. On August 10, 1983, the California Supreme Court denied a hearing on this matter. (Appendix A.)

REASONS FOR GRANTING THE WRIT

Petitioners, WILLIAM S. HARRIS, CONCEPCION QUEVEDO, and GERALD H. GOLDSTEIN, are military retirees whose military retired pay was divided as community property by California state courts prior to 1981 and the decision of this Court in *McCarty v. McCarty, supra. McCarty* held that the operation of federal laws on the subject of military retired pay pre-empted state courts from dividing military retired pay as community property. The question presented by the instant Petition is whether the *McCarty* decision has any affect on previous state court judgments which contravene *McCarty*.

The petitioners are but three of many litigants who need an answer from this Court to the question presented. The scale of litigation on this

issue from California alone indicates the widespread need for its resolution. A page of legal history will illustrate how we got to where we are and why this Court must speak anew on the subject of military retired pay.

Until 1974, the California Supreme Court did not speak definitively on the subject of whether or not California could divide military retired pay as community property. Then it decided *In Re Marriage of Fithian* (1974) 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449, which held, *inter alia*, as follows:

1) That vested military retired pay was divisible as community property ("vested" meant the service member was eligible to retire at the time of trial); (596)

2) That principles of federal pre-emption did not preclude California from dividing military retired pay as community property; and, (599)

3) That military retired pay was not "reduced compensation for reduced current services" but rather something akin to property which could be divided. (604)

We must note immediately that this Court determined in *McCarty* that two of the holdings in *Fithian* were incorrect. *McCarty* held that federal law does pre-empt the application of state community property principles to military retired pay (232) and that military retired pay is reduced compensation for reduced current services. (222)

This Court denied certiorari to the California Supreme Court in the *Fithian* case and therefore *Fithian* remained the law of California until 1981 and the *McCarty* decision. In fact, considerable expansion of the *Fithian* holding occurred in California during the period 1974 to 1981. In *In Re Marriage of Brown* (1976) 15 Cal.3d 838, the California Supreme Court held that the *Fithian* holding would be expanded to cover cases where the right of the service member to military retired pay was not "vested," that is, to cases where the service member had less than twenty years of service at the time his marriage was dissolved. For example, if a service member had served ten years of active duty and during all of them he was married, a California court could award his spouse an interest in his prospective military retired pay based upon the formula years-of-the-marriage as the numerator over total-years-of-service-during-marriage as the denominator times the military retired pay of the service member. If

the service member eventually served a total of twenty years, the interest of his spouse in the military retired pay would, therefore, be twenty-five percent and be payable to her for life and not be modifiable no matter what the circumstances, or terminable upon her remarriage.

In 1980, the California Supreme Court held that where a vested military pension had been "missed" in a dissolution proceeding, that is, it had not been disposed of by judgment, the spouse of the retiree could later come back in and compel a "partition" of the military retired pay "asset" in which the parties had remained tenants-in-common. *Henn v. Henn* (1980) 26 Cal.3d 323. Indeed, the retiree could be forced to account for and pay over retired pay received prior to the partition action, subject only to the protection of principles of equity. *Henn, supra*, 333.

The petitioners and countless others had their military retired pay divided during the period 1974-1981 when California operated under the mistaken decision of *Fithian*. When *McCarty* was decided, they and many other military retirees presented their cases to the California courts and were uniformly told by those courts that they would receive no relief, that the *McCarty* decision would not apply to "closed" cases, *i.e.*, cases in which no appeal was pending or in which jurisdiction over the issue of military retired pay had not been reserved. *In Re Marriage of Sheldon* (1981) 124 Cal.App.3d 371; *In Re Marriage of Mahone* (1981) 123 Cal.App.3d 17; *In Re Marriage of Fellers* (1981) 125 Cal.App.3d 254. We should note that when state courts attempt to determine the effect of a decision of this Court on their prior state court proceedings, they must guess at what federal courts will hold. *McCarty* determined that the character of military retired pay and what can be done with it in state courts is exclusively a federal question. Further, the extent to which a federal court must attach conclusive effect to prior state court proceedings is a federal issue. *Adam v. Sanger* (1938) 303 U.S. 59, 64. Cases like *Sheldon, supra*, attempt to predict what this Court will hold and in the view of petitioners they do so incorrectly.

The Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) was passed by Congress in response to the *McCarty* decision and took effect February 1, 1983. 10 U.S.C. Section 1408. At present, California courts once again attempt to determine the combined effect of *McCarty* and FUSFSPA. *In Re Marriage of Buikema* (1983) 139 Cal.App.3d 689; *In Re Marriage of Frederick* (1983) 141 Cal.App.3d 876; *In Re Marriage of Hopkins* (1983) 142 Cal.App.3d 530; *In Re Marriage of Camp* (1983) 142 Cal.App.3d 217; *In Re Marriage of*

Ankenman (1983) 142 Cal.App.3d 833; and *In Re Marriage of Sarles* (1983) 143 Cal.App.3d 24. These cases indicate an ongoing need for this Court to clarify its decision in *McCarty* so that state courts will not have to guess at its ultimate response.

The petitioners know that already filed with this Court is a Petition for Certiorari to the Ninth Circuit Court of Appeal in *Armstrong v. Armstrong*, Case No. 82-2139, which raises through the federal court system substantially the same question presented by the instant cases, *i.e.*, whether or not *McCarty* has any "retroactive" effect. Further, there is *White v. White*, Case No. 83-68, filed with this Court on July 15, 1983, out of the Ninth Circuit Court of Appeal and that asks this Court to determine whether or not the effect of *McCarty* is a federal question well-pleaded as such by the petitioner in the United States District Court for the Southern District of California. A decision by this Court in either the instant or the *Armstrong* case would answer the question of retroactivity, while a decision in the *White* case would provide important guidance to the other cases.

The foregoing makes it clear that the issues raised by the instant cases are significant and affect a large number of litigants.

FEDERAL PRE-EMPTION IS JURISDICTIONAL

Pre-emption by the federal government, quite simply, deprives state courts of subject matter jurisdiction and this has been so from the earliest days of our country. In *McCulloch v. Maryland* (1819) 4 Wheat. 316, Chief Justice Marshall construed the Supremacy Clause as the bulwark of national power it has since remained, when he declared:

> "The states have no power by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government." 4 Wheat. at 463.

Chief Justice Marshall again articulated the meaning of the Supremacy Clause in *Gibbons v. Ogden* (1824) 9 Wheat. 1, 6 L.Ed. 23, when he stated:

> "The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law." 9 Wheat. at 210, 211.

Ever since *McCulloch* and *Gibbons*, if a state action is seen to be incompatible with any legitimate exercise of power by the federal government, it loses all claim to validity - and this is true even though the state action in question was taken within a sphere in which the states could otherwise act. *Free v. Bland* (1962) 369 U.S. 663, 666, 8 L.Ed.2d 180, 82 S.Ct. 1089; *Franklin Nat. Bank v. New York* (1954) 347 U.S. 373, 379, 98 L.Ed. 767, 774, 74 S.Ct. 550; *Wissner v. Wissner* (1950) 338 U.S. 655, 94 L.Ed. 424, 7 S.Ct. 398.

This Court in its last two sessions has well followed the decisions of *McCulloch* and *Gibbons* and it has held state action invalid when contrary to the Supremacy Clause. *Blum v. Bacon* (1982) 457 U.S. 132, 72 L.Ed.2d 728, 102 S.Ct. 2355; *Fidelity Federal Savings and Loan Association v. de la Cuesta* (1982) ____ U.S. ____, 73 L.Ed.2d 664, 102 S.Ct. ____, 50 U.S. Law Week, 4916. This Court continually uses the phrase "nullity" when it speaks of state acts in contravention of federal pre-emption. In *Fidelity Federal Savings, supra*, 50 U.S. Law Week at Page 4919. In *New Mexico v. Mescalero Apache Tribe* (1983) ____ U.S. ____, 76 L.Ed.2d 611, 103 S.Ct. ____, the court dealt with a collision between New Mexico hunting and fishing regulations and Indian tribal regulations on the same subject. In holding that the state laws had been pre-empted, the court held that federal pre-emption means a state is *without jurisdiction* to act in the pre-empted area.

That this Court intends the doctrine of pre-emption to nullify state action is further demonstrated by *Ridgway v. Ridgway* (1981) 454 U.S. 46, 101 S.Ct. 49, 70 L.Ed.2d 39, wherein the court swept away an earlier injunction by a state court that required a service member to retain a serviceman's group life insurance policy in effect on his life for the benefit of his three children. The *Ridgway* court quoted from *United States v. Yazell* (1966) 383 U.S. 341, 352, when it held:

> "The relative importance to the state of its own law is not material when there is a conflict with a valid federal law, where the Framers of our Constitution provided that the federal law must prevail."

The *Ridgway* case is of particular interest since the service member had stipulated in a Maine divorce court that he would name his then spouse as beneficiary of his Servicemen's Group Life Insurance. He later remarried and named his new spouse as beneficiary of the insurance and this Court upheld his right to do so under the doctrine of federal pre-emption in spite of the fact that the earlier state court judgment was both stipulated to and final. Pre-emption simply nullified the prior state action.

An older case, *Kalb v. Feuerstein* (1940) 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370, illustrates the same point. A mortgagor-farmer had been determined liable in a foreclosure action successfully brought against him in state court. The farmer then went into federal court and collaterally attacked the state court judgment on the basis that the Federal Bankruptcy Act, by which farmers were being granted a mortgage moratorium, pre-empted the state court from exercising subject matter jurisdiction over the foreclosure. This Court upheld his position and declared that state court judgments which purported to exercise jurisdiction over pre-empted areas of federal concern are "nullities and vulnerable collaterally." *Kalb, supra*, at 436.

This Court has on many previous occasions considered conflicts between federal law and state community property laws and each time resolved the conflict in favor of federal pre-emption. *Yiatchos v. Yiatchos* (1964) 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724; *Wissner, supra*; *Free v. Bland, supra, McCune v. Essig* (1905) 199 U.S. 382, 26 S.Ct. 78, 50 L.Ed. 237; *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572.

A California Court of Appeal has pointed out that *McCarty* interprets federal statutes and that its interpretation expresses the definitive meaning of those statutes and that *McCarty* fixed the meaning of the law retroactively to 1968. *Sharpe v. Superior Court* (1983) 143 Cal.App.3d 469. In *Sharpe*, the spouse of a retiree was suing her former attorney who had not done anything about the military retired pay of her husband whom she divorced in 1968. The defendant attorney contended that since, under *McCarty*, the wife had no interest in the military retired pay in 1968, there could be no malpractice. The Court of Appeal held that the wife never had a property right in her ex-spouse's military pension capable of being forfeited. "She had no vested right in erroneous California caselaw, which might have been applied to her claim had it been timely raised." The "erroneous California caselaw" is *In Re Marriage of Fithian, supra*.

Petitioners contend that under the doctrine of federal pre-emption each of the judgments in their respective cases is void for lack of jurisdiction. California cases have tried to determine the retroactive effect of *McCarty*, if any, by looking at decisions of this Court that do *not* involve federal pre-emption. For example, in *Sheldon, supra*, the court placed primary reliance upon *Chevron Oil Co. v. Huson* (1971) 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349, in denying any retroactive effect to *McCarty*. *Huson*, however, dealt with the retroactivity of a decision of this Court that did not involve the doctrine of federal pre-emption. The *Huson* decision, accordingly, involves a weighing of those factors which go into the determination of the retroactivity of any appellate decision in a civil case. It is not instructive as to the effect of pre-emption.

Alternatively, the petitioners assert that because of the definitive characterization by this Court of military retired pay as "reduced compensation for reduced current services" and its classification of military retired pay as the "personal entitlement" of the service member, it cannot constitutionally be divided as community property.

MILITARY RETIRED PAY IS REDUCED COMPENSATION FOR REDUCED SERVICES

The United States Supreme Court and all Federal Courts have held that military retired pay is *not* "property." *United States v. Tyler* (1882) 105 U.S. 244, 26 L.Ed. 986; *United States v. Morton* (1884) 112 U.S. 1; *United States v. Mills* (1904) 197 U.S. 223; *Kahn v. Anderson* (1920) 255 U.S. 1; *Leonard v. United States* (1928) 279 U.S. 40; *Costello v. United States*, 587 F.2d 424, 427 (9th Cir. 1978) *cert. denied*, 442 U.S. 929 (1979); *Puglisi v. United States*, 564 F.2d 402 (Ct.Cl. 1977), *cert. denied*, 435 U.S. 968 (1978); *Lockhard v. Mittlemann*, 123 F.2d 703 (2d Cir. 1941); *Lemly v. United States*, 75 F.Supp. 248 (Ct.Cl. 1948); *Abbot v. United States* (1973) 200 Ct.Cl. 384; *Andrews v. United States* (1966) 1975 Ct.Cl. 561; *Watson v. Watson*, 424 F.Supp. 866 (E.D. N.C. 1976); *Chambers v. Russell*, 192 F.Supp. 425 (N.D. Cal. 1961); *Hooper v. Hartman*, 163 F.Supp. 427 (S.D. Cal. 1958), *aff'd.* 274 F.2d 429 (9th Cir. 1959); *Jones v. United States*, 185 F.Supp. 437 (E.D. N.Y. 1960); *Hoeppel v. Westover*, 79 F.Supp. 794 (S.D. Cal. 1948).

These cases say that military retired pay is "compensation . . . continued at a reduced rate, and a connection continued with retirement from active service only." *Tyler, supra*, 105 U.S. 245. This Federal

definition of military retired pay has held true from *Tyler* in 1882 until *McCarty* in 1981, which had as one of its considerations the very same holding, that is, that military retired pay is "reduced compensation for reduced current services." *McCarty, supra.*

Federal cases which uniformly characterize military retired pay as reduced compensation for reduced current services point to certain indisputable legal facts. A retiree may be called to active duty in time of war or national emergency declared by the President. 10 United States Code, Section 6481. He is subject to the Uniform Code of Military Justice and, indeed, may be recalled to active duty and dismissed from the Naval service. 10 United States Code, Section 802; *Hooper v. United States* (1964) 164 Ct.Cl. 151, 326 F.2d 982, *cert. denied*, 377 U.S. 977. Then there is 5 United States Code, Section 5532, which sets out an elabroate equation to calculate how the military retired pay of a retiree will be reduced in the event he earns other income from the Federal government.

This Court has given a definitive description of military retired pay: it is reduced compensation for reduced current services. California, in contravention of this holding, continues to say that military retired pay is property which can be divided between two parties. California, as other States, requires guidance from this Court from time to time on preemption issues in the area of family law on which it has ruled incorrectly. *Wissner v. Wissner, supra*; *Hisquierdo v. Hisquierdo, supra.* The instant cases squarely present the issue of whether California, in the face of conflicting federal decisions, shall continue to define as property that which this Court has held is not property.

FUSFSPA CANNOT APPLY TO THE PETITIONERS

California with alacrity has seized upon FUSFSPA as indicating that the *McCarty* decision no longer exists. *In Re Marriage of Buikema, supra; In Re Marriage of Frederick, supra; In Re Marriage of Hopkins, supra*; *In Re Marriage of Camp, supra*; *In Re Marriage of Ankenmann, supra*; *In Re Marriage of Sarles, supra.* The cited cases, taken together, indicate that the California Courts of Appeal want to hold that *McCarty* is a "non-case," *i.e.*, completely abrogated by the passage of FUSFSPA.

First, it is doubtful that Congress intended FUSFSPA to have any retroactive effect. The word "retroactive" does not appear in its text. Its subsection (c)(1) simply states:

> "Subject of the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

Its Section 1006(a) states that the Act shall take effect on the first day of the first month which begins more than one hundred twenty days after the date of the enactment of the particular Title. The Act became effective Feburary 1, 1983.

A reasonable and constitutional reading of the Act would limit its effect to military retired pay earned after February 1, 1983. Statutes generally operate only prospectively, while judicial decisions generally operate retrospectively. *Union Pacific R. Co. v. Laramie Stock Yards Co.* (1913) 231 U.S. 190, 199. "The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other." *United States v. Schooner Peggy* (1801) 5 U.S. (1 Cranch) 103, 110. *Bradley v. Richmond School Board* (1974) 416 U.S. 696, 711.

To give FUSFSPA any retroactive effect upon rights to military retired pay that accrued prior to February 1, 1983, would raise severe constitutional problems. The service of these petitioners was performed at a time when the law of the land was that their military retired pay was their "personal entitlement." *McCarty, supra*, 224. Their repeated enlistments were under the promise of their government that their military retired pay would be *theirs*. This Court recognized the contractural aspect of military service when it said in *Wissner v. Wissner, supra*:

> "Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exception provision is his guaranty of the complete and full performance of the contract to the exclusion of conflicting claims." *Wissner v. Wissner, supra*, 660.

Further, it is clear from *United States v. Larionoff* (1977) 431 U.S. 864, and *Costello v. United States, supra*, that, if retired pay had been fully earned as of the date of retirement, Congress cannot divest the retired service member of his retired pay without compensation. In *United States v. Larionoff, supra*, the military members had extended their enlistments in return for a promise that a bonus award would be paid them in return for commitments to extend active duty service. Prior to the expiration of the re-enlistment term, military regulations altered the nature of the bonus program, and certain members who had re-enlisted were omitted in the regulations as eligible to receive the bonus. Plaintiffs contended the Congress had not intended to divest them of rights they had already earned, so that the military regulations which so provided were invalid. In holding for plaintiffs, the Supreme Court noted:

> "Thus, unless Congress intended, in repealing the VRB program in 1974, to divest Johnson of the rights he had already earned, and constitutionally could do so, the prospective repeal of the program could not affect his right to receive a VRB, even though the date on which the bonus was to be paid had not yet arrived.
>
> Of course, if Congress had such an intent, serious constitutional questions would be presented. No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprives members of benefits they had expected to be able to earn. Cf. *Bell v. United States* (1961) 366 U.S. 393; *United States v. Dickerson* (1940) 310 U.S. 554. It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the Congressional action would appear in a different constitutional light." 431 U.S. at 879.

In *Costello v. United States, supra*, the Court stated (with reference to the above-quoted language from *Larionoff*) that in a case involving military retired pay it would "proceed on the assumption, arguendo, that if retirement pay had been fully earned at the date of retirement it could not be divested without compensation." 587 F.2d at 427 n. 2.

Thus, the petitioners, all of whom retired prior to February 1, 1983, had rights in their military retired pay that had been well defined by this Court. Congress may well have the power to redefine those rights as they are acquired after February 1, 1983. Under the doctrine of separation of powers, however, Congress has no power to change or modify rights earlier acquired under definitions of this Court. Legislative action cannot retroactively act upon past controversies and reverse decisions which the courts in the exercise of their undoubted authority have made. Such action would be an unconstitutional legislative exercise of judicial power. *Personal Finance Co. of Braddock v. United States* (1949) 86 F.Supp. 779, at 784. *Personal Finance* holds that the legislative branch of government has no power by subsequent act to declare the construction of a previous act when that action prejudicially affects constitutional and vested rights that have attached under the prior act. *Personal Finance Co., supra*, 784. Such action would violate the doctrine of separation of powers for the legislative body cannot retroactively modify rights established by judicial decision. *Cerro Metal Products v. Marshall* (1949) 467 F.Supp. 869. Although federal judicial decisions do frequently incur the wrath of the majority, under our tripartite constitutional form of government, such decisions are the law of the land and cannot be abrogated by legislative action. *Resident Advisory Board v. Rizzo*, 25 F.Supp. 987 (E.D. Pa. 1976), *affirmed* 595 F.2d 1214 (3d Cir. 1979), *cert. denied* at 442 U.S. 947.

One California Court of Appeal, in *Sharpe v. Superior Court, supra*, has recognized the problem that *McCarty* interprets federal statutes and fixes their meaning as it existed in the past. *Sharpe* quotes the venerable *Marbury v. Madison* (1805) 5 U.S. 137, to the effect that it is emphatically the provision and duty of the judicial department to say what the law is.

Further, there is no warrant for taking the property or money of one and transferring it to another without compensation. *Railroad Retirement Board v. Alton R. Co.* (1935) 295 U.S. 330, 357. If a Congressional enactment alters vested rights, the act denies due process of law by taking the property of one and bestowing it upon another. This financial burden cannot be justified upon the plea that it is in the interest of the economy, or will promote efficiency or safety. *Id.* at 350. The Congress has itself spoken approvingly of this due process limitation. See *Richardson v. Simon*, 560 F.2d 500, 503-504 n. 4 (2d Cir. 1977). Cf. *Frazier v. Goddard*, 156 F.2d 938, 942-943 (10th Cir. 1946), *cert. denied* 329 U.S. 765.

When the legislature modifies a direct obligation which the sovereign owes to persons who have justifiedly relied upon its promises, the standard to which the modifying legislation may be held is higher than if the legislation is merely regulating relations between private parties. *Lynch v. United States* (1934) 292 U.S. 571.

A recent sample of the application of the principle of prospective application only of statutes is found in *United States v. Security Industrial Bank* (1982) ____ U.S. ____, 74 L.Ed. 235, 103 S.Ct. ____. In that case, creditors had loaned debtors money and perfected liens on certain property held by the debtors. Then Congress exempted as property to be included in the debtors' bankruptcy estate the property subject of the liens.

The Court of Appeals, at 642 F.2d 1195 (1981), held that the Amendment to the Bankruptcy Act was retroactive, that is, that Congress intended to invalidate liens acquired before its enactment date. The Court of Appeals held, however, that such an application violates the Fifth Amendment since it effected a complete taking of the secured creditors' property interest.

The United States Supreme Court saw right away the problem that retroactive destruction of the creditors' liens probably would not comport with the Fifth Amendment. It noted that a "taking" is not limited to outright acquisitions *by the government for itself*. In other words, the destruction of one person's right for the benefit of another can be a "taking." In any event, the Supreme Court avoided a holding of unconstitutionality of the Bankruptcy Amendment by giving it prospective operation only.

In sum, rights defined by Congress and this Court for nearly a century cannot retroactively be taken away without violating the Constitution. To avoid the effect, this Court must speak on the application of FUSFSPA in the case of these petitioners.

CONCLUSION

The petitioners present significant issues of widespread interest in the areas of federal pre-emption, characterization of military retired pay, and due process. This Court should grant certiorari in this case to put at rest the conflicting claims of litigants in cases where states divided military retired pay.

DATED: November 2, 1983

Respectfully submitted,

KNOLL, CORR & PFEIFER

By: JOHN KNOLL

Attorneys for Petitioners

APPENDICES

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 10 1983

I have this day filed Order DENIED

RECEIVED AUG 12 1983

In re: 4 Civ. *No.* 26521, 26670
26738

ROSALYN S. FENN

vs.

WILLIAM S. HARRIS

and consolidated cases.

Respectfully,

Clerk

8/12/83

RECEIVED JUN 17 1983

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COURT OF APPEAL
4TH DISTRICT DIV. I
FILED

'83 JUN 16 A11:12

KEENAN G. CASADY, CLERK

IN RE: MARRIAGE OF ROSALYN S. AND WILLIAM S. HARRIS	
ROSALYN S. FENN, Respondent, v. WILLIAM S. HARRIS, Appellant.	4 Civ. No. 26521 (Super. Ct. No. D 28598)
IN RE: MARRIAGE OF CONCEPCION AND MARY HELEN QUEVEDO	
MARY HELEN QUEVEDO, Respondent, v. CONCEPCION QUEVEDO, Appellant.	4 Civ. No. 26670 (Super. Ct. No. D-134543)
DORINE S. WOLPA, Plaintiff and Respondent, v. GERALD H. GOLDSTEIN, Defendant and Appellant.	4 Civ. No. 26738 (Super. Ct. No. 422901)

APPEAL from orders of the Superior Court of San Diego County, Sheridan E. Reed and William L. Todd, Jr., Judges. Affirmed.

The sole question in these three appeals consolidated for our review is whether *McCarty v. McCarty* (1981) 453 U.S. 210 permits California courts to continue to enforce a court ordered division of military retirement pay.[1] Each of the orders which appellants' unsuccessfully attempted to terminate predate *McCarty* and are long since final. (See fn. 1, *ante*.) We conclude the orders are valid and enforceable.

In re Marriage of Sheldon (1981) 124 Cal.App.3d 371 (mod. 125 Cal.App.3d 415f) held ". . . that a fully retroactive application of *McCarty* would be inimical to the principles of equity and fairness which underlie this state's family law system. Finding nothing in the nature or rationale of the *McCarty* decision which mandates a retroactive effect, we hold *McCarty* is inapplicable when the property rights in the military

---

[1]In reaching the merits, we ignore the procedural niceties involving appellants' efforts to modify the respective judgments dividing the military retirement pay. In *Wolpa v. Goldstein*, appellant moved on August 6, 1981 to vacate and declare the August 18, 1980 judgment void; in *Fenn v. Harris*, appellant moved for an order to show cause re declaratory relief on September 16, 1981 to modify the February 27, 1980 order; and in *Quevedo v. Quevedo*, appellant filed an order showing cause in re modification on September 2, 1981 to modify the 1979 judgment. Although there is statutory authorization allowing the family law court to modify earlier orders for child and spousal support, child custody and attorney fees (see Civ. Code, §§ 4357, 4370, subd. (a), 4600, 4600.5, subds. (d) and (e), 4801, subds. (a) and (d) and 4811, subd. (b)) there is no comparable statute allowing the court to modify an earlier order dividing the community property. Where there is a change in the law, as argued in the cases here, and the parties seek relief from the prospective effect of the judgment, an independent action in equity is preferable, and in some cases may be required. (See 5 Witkin, Cal. Procedure (2d ed. 1971) Equitable Relief Against Judgment, p. 3744; Rest.2d, Judgments, c. 5, § 73, pp. 197-209.) To invariably proceed by motion can deprive the parties the full panoply of rights permitted in a trial with attendant discovery procedures, a factual record and the court's appropriate statement of decision permitting full and thorough appellate review.

pension have been determined by a dissolution judgment which became final before the filing of the United States Supreme Court's opinion." (At p. 380.)

Orders affirmed.

WIENER, J.

WE CONCUR:

BROWN, P.J.

WORK, J.

4 CIVIL 26521
4 CIVIL 26670
4 CIVIL 26738

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I am a citizen of the United States and a resident of the County of San Diego; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2366 Front Street, San Diego, CA., 92101-1484. On July 22, 1983, I served the within PETITION FOR HEARING in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States Post Office mail box at San Diego, California, addressed to each addressee as follows:

Clerk
Court of Appeal
Fourth Appellate District
Division One
6010 State Building
1350 Front Street
San Diego, CA. 92101

Alden J. Fulkerson
Attorney at Law
Security Pacific Plaza
1200 Third Avenue
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Northridge, CA. 91324

George S. Marinos
Attorney at Law
111 Elm Street
Suite 202
San Diego, CA. 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 22nd day of July, 1983, at San Diego, CA.

Joyce L. Peterson
JOYCE L. PETERSON

STANLEY L. SMITH
A Professional Corporation
Attorney at Law
1700 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101
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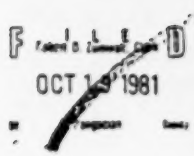

Attorney for Respondent

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

In re the marriage of Petitioner: ROSALYN S. FENN and Respondent: WILLIAM S. HARRIS	Case No. D 28598 ORDER

Respondent's Order to Show Cause Re Declaratory Relief (Cessation of payment of military benefits and reimbursement) and Petitioner's Order to Show Cause Re Attorneys Fees and Cost came on regularly for hearing the 7th day of October, 1981, in Department 20 of the above-entitled court, the Honorable Sheridan Reed, Judge Presiding. Petitioner appeared by and through her counsel, Russell Bankes, Esquire. Respondent appeared in person together with his counsel, Stanley L. Smith, Esquire.

Based on the pleadings before the court and agreement of counsel, the court orders as follows:

IT IS HEREBY ORDERED that Respondent's request for an order seeking to terminate his obligation to pay to Petitioner the previously ordered percentage of Respondent's military retirement benefits is hereby denied.

IT IS FURTHER ORDERED that Petitioner's request for attorneys fees and cost is hereby denied.

Approved.

RUSSELL BANKES

Dated: OCT 19 1981

JUDGE OF THE SUPERIOR COURT
SHERIDAN E. REED

GEORGE S. MARINOS
Attorney at Law
111 Elm Street, Suite 202
San Diego, California 92101
Telephone: 234-3289

Attorney for Plaintiff

FILED
AUG 18 1980
CLERK, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

DORINE S. WOLPA, Plaintiff, vs. GERALD H. GOLDSTEIN, Defendant.	Case No. 422901 JUDGMENT AFTER TRIAL BY COURT

ENTERED
AUG 18 1980
Judgment Book 1357 343
1367 379

This cause came on regularly for trial on June 12, 1980, in Department 33 of the above-entitled Court, the Honorable Jack R. Levitt, Judge, presiding, sitting without a jury, a jury having been duly waived. Plaintiff appeared by her attorney, George S. Marinos. Defendant appeared by his attorney, Jenny W. Hawkins. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, and the Court, on request of defendant, having caused to be made and filed herein its written Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff is the owner of and entitled to a proportionate share of the military retirement pension benefits now payable to the defendant.

2. Military retirement pension benefits are partitioned to plaintiff on the basis of 36.278% of defendant's military retirement pension benefits. This percentage is based on the following formula:

$$\frac{1/2 \times 209 \text{ months (length of marriage before separation)}}{273 \text{ months (time in Navy)}}$$

3. Plaintiff shall receive from defendant 36.278% of the monthly military retirement benefits paid defendant effective July 1, 1980.

4. Plaintiff is awarded costs.

DATED: 8-18-80

JUDGE OF THE SUPERIOR COURT
JACK R. LEVITT

FILED
FEB 27 1979

FRANK L. HIRST
Attorney at Law
1200 Third Ave., Suite 1200
San Diego, CA 92101
Telephone: 239-1167

ENTERED
MAR 29 1979

CASE NUMBER
D 134543

Attorney for Petitioner Judgment Book 1210 Pg. 460

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

In re the marriage of

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

Petitioner: MARY HELEN QUEVEDO

ENTERED

and

Respondent: CONSEPCION QUEVEDO

APR 2 1979

Judgment Book 1211 Pg. 61

This proceeding was heard on 2/28/79 & 3/2/79 before the Honorable BEN W. HAMRICK, Department No. 28.

The court acquired jurisdiction of the respondent on 12/26/78 by:

☐ Service of process on that date, respondent not having appeared within the time permitted by law.

☒ Service of process on that date and respondent having appeared.

☐ Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include

such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

THE PARTIES STIPULATED to all matters herein with the exception of amount of child support, child visitation, disposition of the community residence, division of furniture and automobiles, liability for payment of survivor's benefits premiums in respect to Respondent's U.S. Navy retirement benefits, reservation of jurisdiction for awarding spousal support and payment of certain community debts. The Stipulation was read into the record and approved by the parties. The Court received evidence, both oral and documentary, with respect to the remaining issues. The Court having considered the evidence and having received and approved the Stipulation of the parties and upon good cause shown, IT IS FURTHER ORDERED AND ADJUDGED:

1. The petitioner is awarded the care, custody and control of the three minor children of the parties, to-wit: CONSEPCION QUEVEDO, JR, BORN December 20, 1963, PAUL QUEVEDO, born July 21, 1965 and MICHAEL QUEVEDO, born October 14, 1970. The Respondent shall have the right of visitation with said children at the times hereinfter set forth and such other times as may be mutually agreed upon by the parties without a lady friend being present:

(a) Every other Saturday at 9:00 a.m. to 7:00 p.m. The Respondent shall pick the children up in front of their residence and return them to the door of their residence. If the Respondent is unable to exercise visitation on his designated Saturday he shall notify the Petitioner at least 24 hours in advance.

(b) Alternate holidays. During the even years Respondent shall have visitation on Christmas Day commencing at 10:00 a.m. and the remainder of the Christmas vacation until 7:00 p.m. the night before the commencement of school. During the odd years commencing 1979, Respondent shall have visitation commencing at 7:00 p.m. on the evening of the day that the childrens' Christmas vacation begins until 10:00 a.m. Christmas day. On Thanksgiving and Easter Day Respondent shall have the children on the odd years commencing 1979.

(c) The Respondent shall have said minor children on Father' Day from 9:00 a.m. to 7:00 p.m.

(d) The Respondent shall have 2 weeks summer vacation with the children to coincide with his assigned vacation period from his employment. The Respondent shall notify the Petitioner of the dates of said vacation period promptly upon ascertaining said dates himself.

2. The Respondent shall pay to the Petitioner as and for child support the sum of $110.00 per month per child for a total of $330.00 per month payable on the 10th day of each month commencing March 10, 1979 until further order of Court. That, in addition, the Respondent shall pay to Petitioner as and for child support on the 10th day of each month commencing March 10, 1979 until further order of Court a sum equal to 20% of Respondent's gross overtime earnings; that Respondent shall grovide Petitioner accurate records of his overtime earnings each month.

3. The Petitioner is hereby awarded the following personal property as her separate property, to-wit:

(a) Bankers Life Insurance Co. policy # 2512631 in the face amount of $10,000.00 and with a cash surrender value of $955.00;

(b) 1978 Oldsmobile Cutlass automobile. The Petitioner shall hold the Respondent harmless as to the balance owing on the purchase of said automobile in the approximate sum of $5,000.00;

(c) 39% of the gross retirement benefits hereafter received by Respondent commencing as of March 1, 1979, by reason of his service in the U.S. Navy. The Respondent shall pay to Petitioner her share of said retirement benefits promptly upon receipt of same by Respondent;

(d) The furniture and furnishings presently located at the residence at 1820 Thelborn Way, San Diego, California, with the exception of the items hereinafter set forth in paragraph 4 (d) of this Judgment;

(e) 25 inch Zenith TV set. The Petitioner shall hold the Respondent harmless from the payment of the balance owing on the purchase price of said TV set in the approximate sum of $950.00; and

(f) All checking and savings accounts in the name of Petitioner.

4. The Respondent is hereby awarded the following personal property as his separate property, to-wit:

(a) Bankers Life Insurance Co. policy # 2612565 in the face amount of $17,076.00 and with a cash surrender value of $1,300.00;

(b) 1971 Ford LTD 2-dr automobile;

(c) 61% of the gross retirement benefits hereafter received by Respondent commencing as of March 1, 1979, by reason of his service in the U.S. Navy. The Respondent shall pay the survivor's benefits premiums for so long as they are a required deduction from said retirement benefits;

(d) Electric typewriter, portable TV set, furnishings and personal effects in possession of Respondent together with the trailer, tools and his 10 speed bicycle located at 1820 Thelborn Way, San Diego, California; and

(e) Savings, checking and credit union accounts in name of Respondent.

5. The parties shall forthwith cash in the Bankers Life Ins. Co. policies insuring the lives of the three minor children and turn over the cash received for said policies to Petitioner's counsel for deposit in his trust account.

6. The parties shall maintain their three minor children as the beneficiaries of their respective life insurance policies referred to in paragraphs 3 (a) and 4 (a) herein until the Respondent is no longer under any obligation to pay child support for any of said children.

7. Each party shall pay the other party the sum of $1.00 per year as and for spousal support for a period of 7 years.

8. The parties shall file joint income tax returns, both state and Federal, for the calendar year 1978; Said returns shall be prepared by such person or firm as shall be designated by the parties' respective counsel. Any refund checks shall be turned over by the party receiving it to Petitioner's counsel for deposit in his trust account.

9. The Court reserves jurisdiction to make all necessary orders in respect to each of the parties' community interest in the retirement or pension program in effect by reason of their present employment.

10. The Respondent shall provide the necessary identification cards or forms so that each of the three minor children may continue to receive hospitalization and medical care available through the U.S. Navy so long as the Respondent continues to have any obligation to pay child support for said children. The Petitioner shall pay that portion of the hospitalization and medical expenses not covered by the U.S. Navy.

11. The 24 U.S. Government Series "E" bonds already in possession of Petitioner's counsel pursuant to the Temporary Order entered in these proceedings shall as soon as legally permissible be endorsed by Petitioner, cashed, and the proceeds turned over to said counsel for deposit in his trust account to be applied equally to fees for each of the attorneys for the parties. In addition the proceeds from the cashing of the insurances policies referred to in paragraphs 5 and 8 herein shall also be applied to the attorneys' fees of the parties until each of the attorneys have received a total of $550.00 plus actual costs less the payments already received by each of said attorneys. Any excess remaining shall be disbursed equally to the parties. Each party shall be individually responsible for the payment of the balance of his/her attorneys fees for preparation for trial and trial of this proceeding.

12. The Petitioner shall have exclusive use and occupancy of the residence of the parties located at 1820 Thelborn Way, San Diego, California, for the benefit of herself and the three minor children of the parties until June 15, 1980, or until the residence is sold, whichever event shall sooner occur. That so long as the Petitioner occupies said residence she shall be responsible for the payment of the 1st Trust Deed obligation monthly installment payments. That no later than 90 days prior to said June 15, 1980, the parties shall list said residence with a reliable realtor for sale and thereafter fully cooperate in the sale of said residence. In the event the parties shall designate the broker who shall list and sell the residence. The net proceeds from the sale of the residence shall be divided equally between the parties, provided however, that from Petitioner's share of the proceeds, the Respondent shall receive the sum of $650.00 in order to equalize the value of the community property awarded to each of the parties under the terms of this Judgment. The Court shall retain and reserve jurisdiction of said residence and the sale thereof and shall maintain jurisdiction until the executory provisions of this Judgment in

respect to said residence are fulfilled. A stipulated arrearage in the amount of $810.00 for child and spousal support through March 9, 1979, is included by the Court as Petitioner's share in the division of assets.

13. Each of the parties shall hold the other party harmless in respect to one-half of the purchase price of the lamps in the total sum of approximately $82.00.

14. Each of the parties are permanently restrained and enjoined from physically assaulting, annoying, molesting or harassing the other by telephone calls or otherwise.

DATED: 3-27-79

JUDGE OF THE SUPERIOR COURT
BEN W. HAMRICK

THE FOREGOING INTERLOCUTORY JUDGMENT OF DISSOLUTION IS HEREBY APPROVED.

FRANK L. HIRST
Attorney for Petitioner

ARTHUR J. JOHNS
Attorney for Respondent